

REMARKS

Reconsideration of the application in view of the above amendments and the following remarks is requested.

Amendments to the Specification

The Applicant is proposing amendments to paragraph 0106 to correct errors in the numbering of certain drawings. No new matter is included in the revised paragraph 0106 enclosed.

Amendments to the Claims

The Applicant has amended claims 2, 3, 5, 19, 20, 23, and 43 in order to better define the invention. In accordance with 37 CFR §1.121, the claims which are being currently amended are presented with markings to indicate the changes that have been made relative to the immediate prior version.

Claim rejections – 35 U.S.C. §102**1. §102(b)**

Claims 1, 4, 18 – 20, and 22 were rejected by the Examiner under 35 U.S.C. §102(b) on the basis that such claims were anticipated by U.S. patent application no. 2002/0023376 (Hess).

Claim 1 has been cancelled. The subject matter of claim 1 has been incorporated into claim 2, to better define the invention.

In view of the Examiner's comments, claims 4 and 18 have been cancelled.

Claim 19 has also been cancelled.

With respect to claims 19 and 20, the Examiner had the following comments:

... flicker element 40 includes a plurality of flicker elements 42. This includes a first element and a second element.

However, in the Hess reference which was cited, the "flicker element" (40) is described as comprising "a plurality of strips 42 of substantially reflective material" (paragraph 0029). The strips (42) are further described in paragraph 0029 as being:

... disposed around an axis 44 and extending radially outwardly from the axis 44.

Therefore, the strips (42) are distinct from the flicker element (40), as described in the Hess reference. In the flame simulating assembly disclosed in the Hess reference, it is clear that there is only one flicker element. This is in contrast to the Applicant's invention herein, in which, in certain embodiments, two flicker elements are disclosed (see, e.g., Figs. 4 – 9, 11, 16, 17, 21 – 23, 27B, 27D, 28B, 28D, 30B, and 30C), i.e., one flicker element per screen.

As indicated in §2131 of the Manual of Patent Examining Procedure, a claim is only anticipated if each and every element is found, either expressly or inherently described, in a single prior art reference (referring to *Verdegaal Bros. v. Union Oil of California*).

Because the invention as defined in the amended claim 20 is dependent on claim 2, the invention is defined by claim 20 as including the subject-matter of claim 2 (i.e., two screens, each defining a substantially vertical plane respectively, with one or more light sources positioned between the planes) and the subject-matter of claim 20 (i.e., flicker elements for creating fluctuating light). The Applicant submits that the invention as defined in claim 20 was not anticipated by the Hess reference because the Hess reference does not disclose a flame simulating assembly including two spaced apart screens, as defined in the enclosed amended claim 2, as well as the flicker element.

Claim 22 has been cancelled.

2. §102(e)

Claims 1, 3 – 5, 18 – 22, 43 and 44 were rejected by the Examiner under 35 U.S.C. §102(e) on the ground that they were anticipated by U.S. patent application no. 2004/0060213 (Schroeter et al.).

The Applicant will now consider the Examiner's rejections of claims under §102(e) separately.

- (a) As indicated above, claim 1 has been cancelled.
- (b) The Applicant submits that claim 3 is not anticipated by Schroeter et al. The invention as defined in claim 2 includes two screens, each substantially defining a vertical plane, and also includes one or more light sources disposed between the planes. The invention as defined in claim 3 includes all of the elements and limitations of claim 2 and also one or more flame effect elements. Accordingly, Schroeter et al. does not disclose all of the elements of the invention as defined in claim 3 because Schroeter et al. does not disclose a flame simulating assembly in which a light source is disposed between respective planes substantially defined by two separate screens.
- (c) Claim 4 has been cancelled.
- (d) The Applicant also submits that the invention as defined in claim 5 is not anticipated by Schroeter et al. In claim 5, the invention as defined in claim 2 is defined as additionally including one or more flame effect elements positioned in first and second paths of light directed towards the first and second screens respectively. The Applicant submits that, because Schroeter et al. does not disclose all the elements of the invention as defined in claim 5, Schroeter et al. did not anticipate the invention as defined in claim 5.

- (e) Claim 18 has been cancelled.
- (f) Claim 19 has been cancelled.
- (g) The Examiner indicated that claims 19 and 20 were anticipated by Schroeter et al. because Schroeter et al. disclosed a flicker element (11) "with a plurality of flicker elements 21". The Examiner also stated:

. . . this [i.e., the plurality of flicker elements 21] includes a first element and a second element.

However, Schroeter et al. clearly indicates that the flicker element (11) taken as a whole should be distinguished from its parts (paragraph 0032):

. . . light reflecting element 11 is comprised generally of a horizontally mounted rotating shaft 20 . . . extending outwardly from the surface of shaft 20 is a plurality of light reflecting members or fingers 21 comprised of a highly reflective material. Typically light reflecting members 21 would be situated about the circumference of shaft 20 and extend outwardly therefrom at a variety of different angles . . .

Claim 20 is dependent on claim 2, and defines the invention as including the subject matter of claim 2 as well as a first and a second flicker element. The Applicant submits that Schroeter et al. did not anticipate claim 20 because the invention, as defined in the amended claim 20, includes elements (i.e., two spaced apart screens and two flicker elements) not disclosed in Schroeter et al.

- (h) Claim 21 is dependent on claim 20. The Applicant submits that claim 21 was not anticipated by Schroeter et al. because Schroeter et al. does not disclose the subject matter of the amended claim 2, the subject matter of claim 20, and one or more flame effect elements.
- (i) Claim 22 is cancelled.

(j) Claim 43 has been amended.

- (i) First, claim 43 has been amended so that the first and second screens are defined as including front and back surfaces. Support for this can be found at paragraph 0067 and in Fig. 5.
- (ii) The screens are also defined as being positioned relative to each other so that front surfaces thereof face in substantially opposite directions, and back surfaces thereof face each other. Support can be found in Fig. 5.
- (iii) The flame effect element is said to be positioned at least partially between the screens. Support can be found at paragraph 0058 and in Fig. 5.

The Applicant submits that Schroeter et al. does not disclose all of these elements and, accordingly, Schroeter et al. did not anticipate the invention as defined in the amended claim 43.

- (k) Claim 44 is dependent on claim 43. Schroeter et al. does not disclose all the elements of amended claim 43 and claim 44. Accordingly, the Applicant submits that Schroeter et al. did not anticipate the invention as defined in claim 44 because Schroeter et al. does not disclose all the elements of such invention.

Allowable Subject Matter

The Examiner indicated that claims 2, 6, 23, 25 – 28, 30, 32, 34, 35, 37, and 45 were objected to as being dependent on a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

The Examiner also indicated that claims 24 – 42 were allowed. In addition, claims 34 – 41 were described as being rejoined on the basis that they were dependent on an allowable generic claim.

The Applicant notes that claims 29, 31, and 38 – 41 had been withdrawn, and because all of these claims are dependent (directly or indirectly) on claim 24, which is allowed, the Applicant believes that, when the Examiner indicated that claims 34 – 41 were being rejoined, the Examiner had intended to refer to claims 29, 31, and 38 – 41 as being rejoined. The enclosed claims have been revised accordingly.

Also, in view of the Examiner's indication that claims 24 – 42 were allowed, the Applicant understands that amendments to claims 25 – 28, 30, 32, 34, 35, and 37 are not required. These claims (i.e., claims 25 – 28, 30, 32, 34, 35, and 37) therefore have not been amended.

As indicated above, claim 2 has been amended.

Claim 6 has not been rewritten, as it is believed (for the reasons set out above) that claim 6 is patentable.

Claim 23 has been amended so that it is now dependent on (amended) claim 2.

New Claim 61

Claim 61 is new and is intended to better define the invention. In the enclosed claim 61, the screens are defined as including front surfaces respectively, and the screens are also defined in terms of their relative positioning, i.e., the screens are disposed relative to each other so that their respective front surfaces are facing in substantially opposite directions. Support for claim 61 can be found in paragraph 0067 and in Fig. 5.

On the basis of the proposed amendments to the claims and the foregoing remarks, reconsideration of this application and its early allowance are requested. The Applicant's agent invites the Examiner to contact the Applicant's agent via telephone if the Examiner considers that a telephone conference would be of assistance in this matter.

Respectfully submitted,

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